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No. 97-335

Supreme Court, U.S.
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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

HARLAN D. VANDER ZEE,
PETITIONER

VS

JANET RENO, STONE OAK NATIONAL BANK,
STONE OAK BANKSHARES, INC
FIDELITY AND DEPOSIT COMPANY OF MARYLAND
ET AL
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## PETITIONER'S REPLY BRIEF

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# No. 97-335
# PETITIONER'S REPLY BRIEF

**Counterstatement of Respondent's "Facts":**

The Petitioner charges in this case a civil conspiracy by renegade Federal prosecutors who far exceeded their statutory authority, after the prosecution was over. Those persons acted intentionally and maliciously to harm the Petitioner, a long-term banking executive, who was ruined by the conspiracy between his employer, (the Bank) and the Federal Government.

As a defense the Bank and the Federal Government claim that the Federal Government and its several employees are not now properly before this Court, because they were severed out leaving only one party, the Bank, to the conspiracy. The Bank further claims that the trial judge did not err when he overruled findings of fact by the jury, as to the contract found by the jury to exist, and resulting damages awarded by the jury.

The mistaken representation that the United States Department of Justice (DOJ)[1] and its overreaching prosecutors are not properly before this Court in this case demonstrates succinctly why this Court should grant the petition.

Both the DOJ and the Bank claim that a conspiracy with only one party left in the case (because of immunity of the other party) can not be viable, and fail to recognize

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[1] The Government makes that representation in its letter to the Court withdrawing its request for an extension of time to oppose Vander Zee's petition.

that the very decision severing the Government out of the case is a part of what is being challenged in this petition.

In addition to that reason, should this Court deem it necessary to achieve justice, the Federal Government and its employees may be brought into this case under this Courts general supervisory powers of cases in the Federal Court System. This is because the Respondents are now before the District Court in the Western District of Texas in a follow- on case authorized by the opinion of the Fifth Circuit in the First phase of this case. Vander Zee has filed to intervene[2] as suggested by the Fifth Circuit in its unusual opinion[3].

**Reasons for Granting the Petition:**

The Court should grant the petition to correct the

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[2] Vander Zee has acted upon the suggestion of the Fifth Circuit panel, and has recently moved to intervene in the civil forfeiture cases before the United States District Court in San Antonio, Texas, United States of America v. Various Salinas Assets, Civil Action Nos. SA-89 CA-0364, 1179, 1273, 1277, and 0113.

[3] In Vander Zee v. Reno, 73 F.3d 1365 (5th Cir. 1996) (This case, Vander Zee I) the Fifth Circuit held, at 1372: "Should Vander Zee wish to challenge the district court's order approving the term of the settlement, the proper avenue would be to seek to intervene before the district court which has retained jurisdiction in order to enforce the terms of its order. F/N 8

F/N 8. Should the district court in that proceeding deny intervention or, although granting intervention, deny Vander Zee relief, he could seek review of such order by direct appeal (or, perhaps, mandamus, should direct appeal be for some reason unavailable)."

manifest injustice to the Petitioner in the denial of his constitutional property and liberty rights. That denial violates the most basic of all of the principles of our government, the principle is that an honest and law abiding citizen should not fear or be abused by his own government. If, through some error or misstep of the government or its employees he is in fact injured, particularly by acts involving violations of constitutional rights, he should be granted relief.

The Court should grant the petition to make clear the governing principle that there was a basic procedural flaw in the District Court's severing the Government and its employees out of a complex conspiracy case. That termination of the conspiracy litigation precluded any fair or reasonable opportunity to prove or even allege with any clarity the serious multiple violations of clearly established constitutional rights via discovery that were prima facie established by the facts then known. And further, once those facts became known, and were proven to exist as happened in this case, the District Court should have revisited the conspiracy in the light of the new facts via the application of F. R. Civ. P. 60(b).

The Court should grant the petition to revise the applicable standards for holding government employees responsible for malicious and vindictive acts beyond the scope of their authority. Here, prosecutors, after the prosecution was over continued to punish an innocent man out of pure and unadulterated vindictive malice with utterly no justification in morality, reasonableness or justice.

The Court should also grant the Petition to make clear the principle that granting Summary Judgment to the Respondent bank on conspiracy charges for lack of a

second party, where one party is immune from prosecution, is wrong as a matter of law. Here, the second party participated in the conspiracy, and even if one party is immune, the conspiracy did happen. The remaining party is not immune and should be held accountable for the wrongdoing.

The Court should also grant the petition to correct the trial judge's overruling of a jury verdict finding a binding contract outside of the limits of his power to do so. This decision would otherwise create a conflict in the circuits on the scope of a District Judge's power to override a jury factual finding.

## ARGUMENT

### I. The Court Should Grant the Petition To Resolve Important Questions of Due Process Wherein the Federal Government and/or its Employees are Necessary Parties to A Civil Conspiracy But Were Erroneously Severed From This Case:

In this case Vander Zee sued the United States of America, several of its Department of Justice Attorneys in their individual capacity, presenting Bivens[4] claims, the Bank's insurance carrier (F&D) and the Bank. The allegations included, as a most basic point, a malicious illegal conspiracy to deprive Vander Zee of his property and liberty interests without due process of law. There can be no question as to the grievous nature of the acts committed or that the government or its agents caused that harm to occur.

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[4] Bivens v. Seven Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

The fact of the vindictive conspiracy was noted by the trial judge in his opinion[5], and was admitted in all essentials at the jury trial by the Bank's counsel in his testimony. The existence of that conspiracy has never been challenged. That conspiracy, which took Vander Zee's job, his bank executive profession of 30 years, and his reputation for truth and honesty, ruined the life and career of a totally honest and innocent man[6], Harlan D. Vander Zee, the petitioner in this case.

Nevertheless, the District Judge removed the Government and its employees from this case by granting summary judgment on erroneous grounds of immunity and a purported failure to allege violations of "Clearly Established Constitutional Rights". That lack of clarity, if indeed it existed, was caused entirely by the misrepresentations of fact told Vander Zee by bank

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[5] The District Judge held:
"It appears that the U.S. Attorneys acted with disgraceful vengeance in drafting the settlement agreement. After failing to present sufficient evidence of Vander Zee's guilt in the proper forum, the lawyers and the U.S. Attorney's Office evidently sought to punish or denigrate Vander Zee in a forum where he could not participate, the civil forfeiture action involving Salinas' Assets". (Appendix K-8).

[6] Chief Judge Bunton of the United States District Court for the Western District of Texas, in San Antonio, upon the conclusion of the government's criminal case, entered a directed verdict for Petitioner of not guilty, commenting that all that the government proved was that Vander Zee did nothing that a prudent banker would not have done.

A subsequent Freedom of Information case, Vander Zee v. United States of America, Western District of Texas Case No. A. 95 cv 366 (1997) was filed by Vander Zee and recently completed. It disclosed not a scintilla of information, much less actual evidence of culpability or wrongdoing of any kind by Vander Zee.

officials who were forced to tell untruths to the Petitioner by the DOJ attorneys.

No discovery had been allowed up to the time the judge dismissed the case resulting in no opportunity at all to correctly determine who had harmed him or their actual authority of those government attorneys, co-conspirators with the Bank, to act in the manner they did, far beyond the scope of their function as government prosecutors. For after all, their function as prosecutors, and the prosecution itself was over at the time of their final acts which harmed Vander Zee, the de-facto barring of him from banking from all time.

Then, after the Government and its employees were gone from the case, and the charges of conspiracy dismissed as against the Bank, the Judge, along with Vander Zee, at trial, learned the key facts which would have held the government and its employees in to the case. A Rule 60(b) motion to reconsider the newly discovered facts, and to supplement the appellate record were made but denied. These are the very decisions from which this appeal is taken.

Under these circumstances, all of those decisions are subject to challenge. It is therefore false to state that the Government is not properly before this Court as to every element of the conspiracy now known to exist and contained in the record of this case.

**II. The trial court erred in overruling the jury verdict as to breaches of contract by the bank and resulting damages to Vander Zee.**

After his indictment and while his criminal case was pending, Vander Zee was induced by his employer, the Stone Oak National Bank (the Bank) to quietly resign.

The Bank was coerced to demand Vander Zee's resignation to disenable Vander Zee's criminal defense to charges of money laundering. The prosecuting attorneys accomplished that objective and the cooperation of the bank, by threat of the Department of Justice's (DOJ's) closing the bank.

In exchange for the quiet but forced resignation without the hearing to which he was entitled under federal regulations, the Bank promised him, (the Jury in this civil case found) that it would re-hire him[7] when the problem was over, pay his salary, attorney's fees for his defense, and his medical insurance during the period while the criminal case was pending.

After dismissal of all conspiracy charges, the judge allowed the jury trial to go forward on the several factual issues for the alleged breach of contract actions against the bank. The basic factual issues involved whether one or more binding contractual promises, including the element of consideration, had been made to Vander Zee by the Bank. Voluminous documentary evidence and several witnesses, including the Bank's counsel who supervised the termination of Vander Zee and the negotiations for the Bank with the DOJ were presented to the jury.

The jury, after full and complete instructions on the law, including the requirement of consideration, found the contracts did exist, and were binding upon the Bank. The judge eliminated all findings of fact by the jury, except as to the award of statutory attorney's fees due Vander Zee

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[7] The bank's statement on Pg. 5 of its Response that Vander Zee never asked the Bank to rehire him as it promised is false. See letter of his attorney, Pl. Ex 59.

in his criminal defense. In the process of reducing that final judgment, the judge reduced the award below the point at which a prior "offer of judgment" would be in effect. The judge then denied statutory relief as to attorneys fees due Vander Zee's attorneys who prevailed before the jury on the grounds that the offer of judgment precluded any such award.

**A. Consideration For the Contract Existed, The Jury So Found:**

(1) The Jury was presented with evidence that the bank induced the petitioner, Vander Zee, to quietly resign, accept the coerced termination pending exoneration and promised to thereafter reinstate him. The Bank, through the testimony of its counsel, admitted that it was coerced to do this by threat of the Bank's closure by the DOJ.

The jury finding of fact specifically found binding promises were made to Vander Zee and implicitly found benefit to the bank, thereby furnishing the necessary element of consideration for the contract(s) in both directions, to the Bank from Vander Zee and to Vander Zee from the bank, i.e. the promise to reinstate him. These findings were reversed by the Judge.

(2) The judge had no power to overturn that correct evidence based factual finding of the jury. The Court thereafter is bound by that factual finding and under the well accepted and uncontradicted authorities[8]

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[8] "Unless the evidence, along with all inferences reasonably to be drawn therefrom, when viewed in the light most favorable to the plaintiff is such that reasonable jurors in fair and impartial exercise of judgment could not reasonably disagree in finding for the defendant, the motion must be denied",

must treat the jury findings of fact as true. The judge did not do that thereby violating a cardinal principle of our jury system.

(3) The Bank's argument in the brief in opposition is based upon a falsity, namely that the foregoing factual finding of the jury[9] is not true. The falsity is that no promises were made to Vander Zee upon which he relied and/or that no benefit flowed to the Bank from the contract. The simple answer to this argument is that the jury found to the contrary.

## III. The Court Should Grant the Petition To Resolve The Conflict In The Circuits Concerning the District Judge's Overruling the Jury Verdict.

It is a basic fact, ignored by the Respondent Bank,

(Continued, Footnote 8):

Vander Zee V. Karabatsos, 589 F. 2d 723, 726 (D.C. Cir 1978), Cert Den 441 U.S. 962, 99 S.Ct. 2407, 60 L Ed 2d 1066 (1979); Brown v. Moore, 247 F 2d 711, Cert Den 355 U.S. 882, 2 LEd 2d 112, 78 S Ct 148 (3rd Cir Pa 1957); Gallager v. Wilton Enterprises, Inc. 962 F 2d 120 (1st Cir. 1992); O'Neil v. W.R. Grace & Co., 410 F 2d 908 (5th Cir. 1969); Ward v. Reeled Tubing, Inc. 811 F 2d 600 (5th Cir 1987); The trial court is not free to weigh evidence Song v. Ives Laboratories, Inc. 957 F. 2d 1041 (2nd Cir 1992); particularly after submitting the evidence to a jury, Gallager, supra.

[9] The jury found a contract existed, and the Bank admitted at oral argument before the Fifth Circuit, that some consideration flowed to it from Vander Zee's quiet resignation. It remained in business as the result of continued negotiation with the government, which, as a prerequisite, included harming Vander Zee by breaching its contractual obligations to him (the jury found) and inserting false and derogatory information about Vander Zee in the settlement agreement between the Bank and the DOJ.

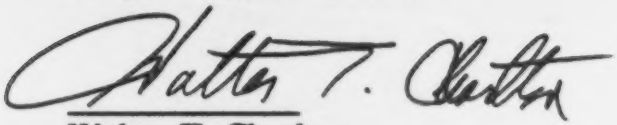
that the Judge overruled the jury's verdict based upon his own perception of what the facts in this case should be, ignoring the facts of record as presented to the jury and the jury findings. It is basic to our jury system that a District Judge cannot overturn facts found by a jury, with exceptions not argued and not applicable here. See cases as cited in F/N 8 supra.

The law on the power of a Federal Judge to overrule a jury is well settled. The judge cannot do that unless very well defined exceptions are present. Those exceptions were not present in this case and were not even discussed by the Court or the Defendant, creating a conflict in the circuits if this case is allowed to stand. For this reason the Court should grant certiorari to resolve the conflict within the circuits which has arisen due to this case.

CONCLUSION:

The Court should grant the petition as vitally important (1) to the relationship between the powers of government agencies to take rights and property of individual citizens without due process of law, (2) a continuation of the proper functioning of the jury system in these United States (3) to resolve a conflict within the circuits which has arisen with respect to a well-settled cornerstone of our jury system and (4) to correct clearly mistaken applications of basic principles of accountability for constitutional violations within the framework of the Federal Court System and its rules of procedure resulting in manifest injustice to the petitioner.

Respectfully submitted,



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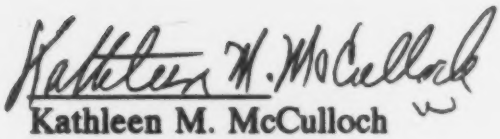

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